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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MATTHEW HEMINGWAY, Plaintiff and Appellant, v. DESERT PACIFIC COUNCIL, Defendant and Respondent.	D040500 (Super. Ct. No. GIN013429)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

The Desert Pacific Council (the Council), which operates a Boy Scout camp, employed Matthew Hemingway when he was a minor. This case arises from Hemingway's alleged sexual molestation at the camp by another employee of the Council. Hemingway appeals a judgment for the Council, entered after the court sustained without leave to amend a demurrer to his cause of action for negligent

supervision, and gave the Council judgment on the pleadings on his cause of action for sexual harassment in violation of California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).

Hemingway contends the court erred by ruling (1) his cause of action for negligent supervision is subject to the exclusive remedy of workers' compensation, because he alleged no facts showing ratification, and (2) the one-year statute of limitations for filing an administrative claim with the Department of Fair Employment and Housing (DFEH) was not tolled during his minority, and his failure to timely file a claim bars his FEHA action. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because we are reviewing rulings made at the pleading stage, we take the factual background from allegations of the complaint, assuming their truth, and documents of which the trial court took judicial notice. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 171.)

The Council owns and operates Camp Mataguay, a Boy Scout facility. The Council employed Hemingway at the camp the summers of 1997 and 1999, when he was 15 and 17 years of age. During both summers, and continuing to September 1999, Glenn Jordan, a camp director, gave Hemingway alcohol and drugs, causing him to become inebriated, and sexually molested him.

In 2000 Jordan was arrested and charged with numerous crimes arising from his sexual molestation of minors. According to Hemingway, Jordan was "convicted and is currently serving a 13-year term . . . in state prison."

Hemingway turned 18 years of age on June 16, 2000. On May 31, 2001, he filed a claim with the DFEH for sexual harassment, stating he believed his minority when the molestations occurred tolled the statute of limitations until June 16, 2001.

In June 2001 Hemingway filed this action against the Council, and in July he filed a first amended complaint for negligent hiring and supervision, and sexual harassment in violation of the FEHA.[1] In the FEHA count, Hemingway alleged Code of Civil Procedure section 352 tolled the applicable statute of limitations during his minority.

The Council successfully demurred to the negligence cause of action on the ground it is barred by the workers' compensation exclusivity rule. Hemingway moved for reconsideration, arguing newly discovered facts showed the Council knew of Jordan's prior misconduct and did nothing, thereby ratifying his conduct, and based on those facts he could amend his complaint to allege a negligence cause of action not subject to workers' compensation law. Hemingway's counsel filed a declaration stating she discovered that in 1997 a David Morgan sued the Council for wrongful termination of employment, alleging he was fired after complaining that Jordan and another camp director had some involvement with "an accumulation of beer bottles and other materials [that] indicated there was [*sic*] illegal activities occurring at the camp."

In its telephonic ruling, the court denied the motion, finding that although an action for negligent supervision may be stated against an employer on the basis of

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1 Hemingway also sued the Boy Scouts of America, but he later dismissed that party. The first amended complaint also included causes of action for intentional

ratification, Hemingway alleged no facts showing the Council knew of Jordan's propensity to commit acts of molestation. Rather, counsel's declaration suggested only that underage drinking might have occurred at the camp. At oral argument, however, the court continued the matter for approximately 60 days to allow Hemingway to conduct further discovery. Hemingway later advised the court his discovery "has not (to date) revealed facts necessary to sustain a cause of action against [the Council] for [n]egligent [s]upervision" of Jordan. Accordingly, the court affirmed its tentative ruling.

The Council also moved for judgment on the pleadings on the FEHA cause of action, arguing it is time-barred by Hemingway's failure to file an administrative claim with the DFEH within one year of September 1999, the date of the last alleged molestation, as required by Government Code section 12960. The court granted the motion, relying on *Balloon v. Superior Court* (1995) 39 Cal.App.4th 1116, 1119 (*Balloon*), and judgment for the Council was entered on May 23, 2002.

DISCUSSION

I

Demurrer/Exclusivity of Workers' Compensation Remedy

A

In reviewing the propriety of the sustaining of a demurrer, the "court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] . . . The judgment must be affirmed 'if any one of the

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infliction of emotional distress, assault and battery, sexual assault and "vicarious

several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) "While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion." (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.)

B

Hemingway contends the court erred by determining his cause of action for negligent supervision is barred by the workers' compensation exclusivity rule.

"Labor Code section 3600, subdivision (a), provides that, subject to certain particular exceptions and conditions, workers' compensation liability, 'in lieu of any other liability whatsoever' will exist 'against an employer for any injury sustained by his or her employees arising out of and in the course of the employment.' . . . [T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve

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liability," but those claims were disposed of on demurrer and are not at issue on appeal.

the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' [Citation.]" (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708, fn. omitted.)

Certain conduct of employers, however, is not subject to workers' compensation law. "[A]ctions by employers that have no proper place in the employment relationship may not be made into a 'normal' part of the employment relationship. . . ." (*Fermino v. Fedco, Inc., supra,* 7 Cal.4th at p. 717.) For instance, an employer's false imprisonment of an employee is not a normal aspect of the compensation bargain. (*Id.* at pp. 720-723; see also *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 476 [action for employer's aggravation of work-related injury through fraudulent concealment not barred by workers' compensation exclusivity rule; now codified in Lab. Code, § 3602, subd. (a)(2)]; Lab. Code, § 3602, subd. (b)(1) [workers' compensation inapplicable to action arising from employer's intentional assault].)

Subdivision (c) of Labor Code section 3601 "insulates the employer from common law vicarious liability to an employee for the acts of another employee." (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 227.) That provision " 'protects the employer from common law liability when one employee is liable to another for culpability beyond the range of mere negligence.' " (*Id.* at p. 226.) However, when an employer ratifies the wrongful conduct of an employee, it has engaged in positive misconduct and may be liable for the employee's conduct as a joint participant. (*Id.* at pp. 227-228.)

Hemingway relies on *Hart v. National Mortgage and Land Co.* (1987) 189 Cal.App.3d 1420 (*Hart*), in which the court held a former employee's causes of action for assault and battery and intentional infliction of emotional distress were not barred by workers' compensation law. There, a coworker sexually harassed the plaintiff, and after management ignored his numerous complaints, he resigned at his doctor's urging. (*Id.* at p. 1424.)

The court explained: "There can be little doubt Campbell's acts, as alleged, had a questionable relationship to employment, and were neither a risk, an incident, nor a normal part of Hart's employment with National. National can be charged with knowledge of the acts by virtue of the fact Hart allegedly reported them to [management], and National failed to take action against Campbell. National can be said to have ratified Campbell's tortious conduct, and thus became a joint participant in it." (*Hart, supra,* 189 Cal.App.3d at p. 1430; see also *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1618 [workers' compensation inapplicable to claim for intentional tort when employer ratified supervisor's physical assault of employee]; *Iverson v. Atlas Pacific Engineering, supra* 143 Cal.App.3d at pp. 227-228 [employer that failed to criticize, censure, terminate, suspend or otherwise sanction an employee after being informed of his intentionally tortious conduct ratified the conduct].)

Hemingway neither develops any argument nor cites any authority for the proposition that a *negligence* cause of action may be excluded from workers' compensation law under principles of ratification. Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary

elements allows us to treat the issue as waived. (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)[2]

In any event, Hemingway neither pleaded facts showing the Council's prior knowledge of Jordan's alleged conduct, nor demonstrated he could amend the complaint to allege such facts. To the contrary, Hemingway's counsel admitted he could allege no additional facts on the ratification issue. Hemingway relies exclusively on his counsel's declaration that she learned the Council fired an employee after he complained that "beer bottles and other material . . . indicated illegal activities [were] occurring at the camp," an allegation somehow related to Jordan and another employee. However, as the trial court correctly found, any knowledge of the Council about underage drinking at the camp did not constitute notice or ratification of Jordan's sexual molestations. "It is settled that approval and ratification by the master with *full knowledge of the surrounding circumstances* may fix liability upon the master for an act of the servant which was outside the scope of employment." (*Jameson v. Gavett* (1937) 22 Cal.App.2d 646, 652, italics added; Civ. Code, § 2339.) The demurrer without leave to amend was proper.[3]

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2 In *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, an insurance coverage case, the court indicated that a claim for negligent supervision would be barred by workers' compensation law despite the employer's ratification. (*Id.* at pp. 1605-1606.) In *Hine v. Dittrich* (1991) 228 Cal.App.3d 59, the court observed in dicta that the exclusivity of workers' compensation may preclude a suit for negligent supervision despite the employer's knowledge of wrongdoing. (*Id.* at p. 63 & fn. 4.)

3 Because we hold workers' compensation law precludes Hemingway's negligence cause of action, we are not required to address nonemployment cases he cites such as *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377.

II

Judgment on the Pleadings/FEHA Claim Presentation Requirement

A

A motion for judgment on the pleadings "is equivalent to a demurrer and is governed by the same standard of review. All material facts that were properly pleaded are deemed true, but not contentions, deductions, or conclusions of fact or law. If leave to amend was not granted, we determine whether the complaint states a cause of action and whether the defect can reasonably be cured by amendment. If the pleading defect can be cured, the trial court committed reversible error. If not, we affirm." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989.)

B

As a prerequisite to an action for sexual harassment in violation of the FEHA, the plaintiff must file an administrative claim with the DFEH within one year of the alleged misconduct, and exhaust that remedy. (Gov. Code, § 12960.) Relying on the tolling provision of Code of Civil Procedure section 352, subdivision (a), Hemingway contends his claim was timely because he filed it within one year of his eighteenth birthday.

In rejecting Hemingway's argument, the trial court relied on *Balloon, supra,* 39 Cal.App.4th 1116. In *Balloon,* Jack in the Box restaurant employed the plaintiff when she was 15 or 16 years old. The plaintiff filed an administrative claim with the DFEH for sexual harassment and discrimination within one year of attaining the age of majority, but nearly three years after her employment terminated. The DFEH issued a right to sue letter, and the plaintiff filed a complaint within one year of that date. The defendants

moved for summary judgment on the ground of plaintiff's delay in filing the administrative claim. The court of appeal vacated the trial court's denial of the motion, holding as a case of first impression that the one-year statute of limitations for filing an administrative claim under Government Code section 12960 was not tolled during the plaintiff's minority by Code of Civil Procedure[4] section 352. (*Balloon, supra,* at p. 1119.) Hemingway does not dispute *Balloon's* applicability to the facts here. Rather, he contends this court should not follow *Balloon* because it was wrongly decided.

We agree, however, with the *Balloon* court's interpretation of section 352. "Our primary aim in construing any law is to determine the legislative intent. [Citation.] In doing so we look first to the *words of the statute*, giving them their usual and ordinary meaning. [Citations.]" (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501, italics added.)

Section 352, subdivision (a) provides: "If a person entitled to bring an *action*, *mentioned in Chapter 3 (commencing with Section 335)* is, *at the time the cause of action accrued* either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action." (Italics added.) Chapter 3 of part 2, title 2 of the Code of Civil Procedure (hereafter Chapter 3), beginning with section 335, enumerates the times for commencing specified civil actions in court.

If an action is mentioned in Chapter 3, "the minor's cause is protected until majority, no matter what statutory limitations apply to litigants other than minors."

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4 All following statutory references are to the Code of Civil Procedure except when

(*Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 Cal.2d 599, 601 (*Williams*).) "[S]ection 352 . . . governs the time for filing an *action,* not the time for filing a *claim*." (*Rodriguez v. Superior Court* (2003) 108 Cal.App.4th 301, 309 (*Rodriguez*); *Moyer v. Hook* (1970) 10 Cal.App.3d 491, 493.) An "action" is defined in the Code of Civil Procedure as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (§ 22.)

The FEHA administrative claims requirement (Gov. Code, § 12640) is not an action mentioned in Chapter 3. "Instead, it is a substantive precondition to the bringing of a civil action in the superior court. Furthermore, a cause of action for violation of the FEHA does not even accrue until after the administrative remedy is exhausted. [Citation.] Since the language of Code of Civil Procedure section 352 provides that its tolling provisions are triggered only by disabilities extant 'at the time the cause of action accrued,' it can have no effect on claim filing requirements that are a condition precedent to accrual." (*Balloon, supra,* 39 Cal.App.4th at p. 1121.)

Hemingway ignores section 352, subdivision (a)'s express application only to actions mentioned in Chapter 3. In interpreting a statute, however, "[s]ignificance should be given, if possible, to every word of an act, and a construction that renders a word surplusage should be avoided. [Citation.]" (*Home Depot, U.S.A., Inc. v. Contractor's State License Bd.* (1996) 41 Cal.App.4th 1592, 1602.) Subdivision (a) of section 352 is

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otherwise specified.

unambiguous and certain, and is not susceptible to an interpretation that the Legislature intended to toll the time within which an administrative claim for an alleged FEHA violation must be filed. "If the Legislature in its wisdom believes the law should be otherwise, it may make the change by express statutory amendment. Until and unless that event occurs, it is the function of this court to apply the statute as written." (*Williams, supra,* 68 Cal.2d at p. 611.)[5]

Additionally, Hemingway submits that since section 338 generally provides a three-year statute of limitations for an action on a liability created by statute, and the FEHA claim requirement is statutory, it falls within the tolling provision of section 352. However, "it is well settled that where, as here, a specific limitations period applies, the more general period codified in . . . section 338 is inapplicable. '[A] specific limitations provision prevails over a more general provision.' [Citation.]" (*Howard Jarvis Taxpayers Assn. v.City of Los Angeles* (2000) 79 Cal.App.4th 242, 248.)

Hemingway relies on *Jessica H. v. Allstate Ins. Co.* (1984) 155 Cal.App.3d 590 (*Jessica H.*), for the argument we should hold section 352, subdivision (a) applies here, notwithstanding its plain language, for public policy reasons. In *Jessica H.*, this court

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5 Amicus curiae, the Tom Homann Law Association, asserts a FEHA claim is a "special proceeding" within the meaning of section 363, and is thus subject to the tolling of section 352, subdivision (a). Section 363 provides that the "word 'action' as used in this Title is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." However, section 352, subdivision (a) applies only to actions mentioned in Chapter 3, and section 363 appears in Chapter 4. Further, "special proceeding" within the meaning of section 363 is a matter before a court. (*McRae v. Superior Court* (1963) 221 Cal.App.2d 166, 170; §§ 22, 23.) A FEHA claim is a prerequisite to a court action, not a special proceeding before a court.

noted that tolling statutes "effectuate a deep and long recognized principle of the common law and of this state: children are to be protected during their minority from the destruction of their rights by the running of the statute of limitations. . . .' [Citation.]" (*Jessica H., supra,* at p. 595, citing *Williams, supra,* 68 Cal.2d at p. 602.)

Unlike this case, however, *Williams* and *Jennifer H.* concerned actions mentioned in Chapter 3. (*Williams, supra,* 68 Cal.2d at p. 602 [§ 342, prescribing the limitations period for "[a]n action against a public entity upon a cause of action for which a claim is required to be presented"]; *Jessica H., supra,* 155 Cal.App.3d at p. 592 [§ 337, prescribing the limitations period for an action on a written contract].) In response to *Williams, supra,* 68 Cal.2d 599, the Legislature expressly made the tolling provision of section 352, subdivision (a) inapplicable "to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented" in accordance with the government Tort Claims Act. (§ 352, subd. (b); Cal. Law Revision Com. com., 13A West's Ann. Code Civ. Proc. (1982 ed.) foll. § 352, p. 572.) Of course, since an *action* against a public agency is not tolled during minority, the prerequisite administrative *claim* is not tolled.

On the other hand, the Legislature has expressly tolled the time within which foster children may submit claims to the Foster Family Home and Small Family Home Insurance Fund, which "was established . . . to pay, on behalf of foster family homes, claims by foster children and others resulting from occurrences peculiar to the foster care relationship and the provision of foster care services. (Health & Saf. Code, § 1527.1.)" (*Rodriguez, supra,* 108 Cal.App.4th at p. 303.) "A claim against the Fund shall be

submitted to the Fund 'within the applicable period of limitations for the appropriate civil action underlying the claim.' (Health & Saf. Code, § 1527.6, subd. (b).) Thus, the time for filing a claim with the Fund is coextensive with the time for filing the civil action against the foster parent." (*Ibid.*)

In *Rodriguez,* the court held that because the applicable statute of limitations for the plaintiffs' civil action was one year under former Code of Civil Procedure section 340, subdivision (3), and that period was tolled during the plaintiff's minority by section 352, subdivision (a), the time for filing a claim with the Fund was also tolled, albeit not under section 352, but under the express language of section 1527.6 of the Health and Safety Code. (*Rodriguez, supra,* 108 Cal.App.4th at p. 309.) The court presumed the Legislature "concluded that given the vagaries of children in foster care, when a claimant is a minor, the policy of ensuring that the Fund receives prompt notice of the claim is outweighed by other considerations." (*Id.* at p. 310, fn. 6.)

"The rationale for the minor's tolling provision relates to a minor's legal disability. 'Because a minor does not have the understanding or experience of an adult, and because a minor may not bring an action except through a guardian . . . special safeguards are required to protect the minor's right of action.' [Citation.] Therefore, statutes of limitations are tolled to protect the minor's rights from being destroyed during the period of disability." (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 947.)

The purposes of the claim presentation requirement of the Government Tort Claims Act (Gov. Code, § 911.2) "are to give the public entity an opportunity to settle a

claim before suit is brought, to permit *early investigation of the facts*, to facilitate fiscal planning for potential liabilities, and to avoid similarly caused injuries or liabilities in the future." (*Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 712, italics added.) " 'The provisions of the FEHA for filing of a complaint with the [DFEH], administrative investigation, and service of the [administrative] complaint on the employer serve a similar function.' [Citation.]" (*Ibid.,* citing *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 869.) The DFEH has the power and duty to "receive, investigate and conciliate complaints" of unlawful conduct. (Gov. Code, § 12930, subd. (f)(1).)

We agree there is tension between the policies of preserving the legal rights of minors and denying them redress for FEHA violations absent compliance with the claims procedure during their minority. However, the "Legislature has apparently balanced the questions of public policy involved in each instance and has determined whether the policy of extending special consideration to minors outweighed some other policy." (*Artukovich v. Astendorf* (1942) 21 Cal.2d 329, 334.) The early investigation of workplace harassment allegations would likely be thwarted if the FEHA claim requirement is tolled. Notably, *Balloon, supra,* 39 Cal.App.4th 1116, was decided in 1995, and the Legislature has not abrogated its holding. Because Hemingway did not timely file an administrative claim, his FEHA action is barred.[6]

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6 In *Balloon, supra,* 39 Cal.App.4th 1116, the court relied on the opinions in *Artukovich v. Astendorf, supra,* 21 Cal.2d 329; *Billups v. Tiernan* (1970) 11 Cal.App.3d 372; and *Republic Indemnity Co. of America v. Barn Furniture Mart, Inc.* (1967) 248

DISPOSITION

The judgment is affirmed. The Council is awarded costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

HALLER, J.

MCDONALD, J

Cal.App.2d 517 (*Republic*), in support of its holding that the FEHA claims procedure is not tolled during minority. Hemingway asserts *Artukovich v. Astendorf* is inapplicable because it did not involve a tolling issue, but rather held only that when an administrative claim is a prerequisite to the filing of an action, a minor is not excused from the requirement. In that case, the plaintiff filed suit while still a minor, and although the court discussed the inapplicability of section 352 to an administrative claim, the discussion was arguably dictum. (*Artukovich v. Astendorf, supra,* 21 Cal.2d at pp. 330, 333; see also *Jessica H., supra,* 155 Cal.App.3d at p. 595.) Hemingway also attempts to distinguish *Billups v. Tiernan, supra,* 11 Cal.App.3d at p. 376, in which the court held section 352 did not toll mandatory claim filing requirements of the Probate Code, and *Republic, supra,* 248 Cal.App.2d at p. 518, in which the court held the minor insured's claim against her insurer for uninsured motorist coverage was barred by her failure to demand arbitration within one year of the accident, as required by the Insurance Code. We are not required to determine the applicability of these cases because we rely on the express language of section 352, subdivision (a).